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Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM C. CHANLER,
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September 11, 1941.

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In an action under the Jones Act, 41 Stat. 1007, 46 U. S. Code, tit. Shipping, § 688, brought by a ferry-boat employee for negligence causing injuries, the District Court of the United States for the Southern District of New York (MEEKINS, J.) dismissed the cause of action for damages at the close of the plaintiff's case (R. 39). Defendant's offer to consent to a judgment for loss of wages was rejected by the plaintiff's attorney. The Circuit Court of Appeals affirmed the dismissal of the first cause of action in an opinion per curiam, but *sua sponte* allowed the plaintiff a recovery for loss of wages. 119 F. (2d) 800.

1. The facts show the defendant was not guilty of negligence.

Negligence was sought to be premised on the act of the defendant in supplying to the plaintiff, who was in charge of the boiler room on one of defendant's ferry-boats, an open-end, S-shaped wrench which was worn and failed to fit

tightly the nut to which it was applied. The wrench slipped under pressure, and this caused the plaintiff to lose his balance, fall and break three ribs.

The plaintiff had been in the ferry-boat service for twenty years (R. 13-14). His job required him three times a week to unscrew the nuts from the manifold head, change the oil strainers under the plate, and replace the head and make the bolts tight. This job he had been doing on this vessel for three weeks before the accident, and had never suffered a mishap. He was using a wrench of the type regularly used on this work (R. 21, 27).

The plaintiff admitted that wrenches often slip when "a great deal of strain" (R. 30) is applied, without there being any defect in the wrench, and that they often slip off nuts from a variety of causes (R. 31-32), depending upon how the wrench is used (*ibid.*). The plaintiff's testimony as to this is of decisive significance (R. 31):

> "Q. What was it you braced yourself on when you put the strain on the wrench? A. A rod coming down from the deck of the ship; I guess it was to hold the catwalk up.
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> Q. You didn't hold with your hand? A. No, I was pressing myself against that.
>
> Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true? A. Yes.
>
> Q. And that is particularly true when the nut has been in use before and the wrench has been in use before? A. That is true.
>
> Q. That is the usual course of experience, isn't it? A. That is right."

The plaintiff testified in support of his claim that "about two days before" the accident he inquired from the chief

engineer about getting a new wrench (R. 30), and the latter told the plaintiff to look in the tool closet; and that when he did not find any new wrench like he had been using the chief engineer then sent out an order for a new one (R. 19). Later, on cross examination the plaintiff admitted that, although no new wrench like the one he had been using was immediately available, there were other wrenches on board which were suitable for the purpose and could have been used if necessary, and which he had used many times in the past, such as adjustable monkey wrenches and Stillson wrenches (R. 29). It was also brought out that this ferry-boat, which plies between South Ferry, Manhattan, and Staten Island, docked 6 or 7 times a day at each place, where there are storerooms, and the plaintiff could have secured a new wrench, if it was necessary, but did nothing about securing one (R. 30).

2. The "simple tool doctrine" is applicable to the case, and was correctly stated and applied by the Court below.

The opinion of the Court below (LEARNED HAND, SWAN, and A. N. HAND, Cir. JJ.) stated the applicable law thus (119 F. [2d] 800, at pp. 801-802):

> "In taking the first cause of action from the jury the trial judge relied on what is sometimes called the 'simple tool doctrine'. See *Newbern* v. *Great Atlantic & Pac. Tea Co.*, 68 F. 2d 523, 91 A. L. R. 781 (C. C. A. 4). This so-called doctrine is but a short hand method of saying that the employer's duty to use reasonable care for the safety of his workmen does not require him to test or inspect ordinary simple tools from the use of which no danger is reasonably to be expected and as to which the employee is in a better position than the master to discover defects

> resulting from wear and tear and to protect himself against the risk of using the tool, if defective. In other words, the probability of any danger against which the employee cannot reasonably be expected to guard himself is so remote as to relieve the master of the duty of inspecting such simple tools or of warning his employee against the use of them if they show signs of wear. *McMillan* v. *Mineto Shade Cloth Co.*, 134 App. Div. 28, 31, 117 N. Y. Supp. 1081; *Miller* v. *Erie R. Co.*, 21 App. Div. 45, 47, 47 N. Y. Supp. 285."

The Court went on to point out that nothing in the Jones Act forbade the application of the doctrine to the facts in the record, saying (p. 802):

> "The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee."

The Court then adverted to the ready availability of other wrenches, saying (p. 802):

> "In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in using the worn wrench; if the wrench was in such condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand. Under these circumstances the master had no reason to suppose that the plaintiff would use a wrench so worn as to create a situation of danger. Consequently we think the trial judge was right in not leaving to the jury the issue of negligence."

3. The doctrine is well established. No conflict of decisions among the Circuits exists. Nor were pertinent authorities in this Court overlooked.

Decisions in accord with that sought to be reviewed have been rendered in several other Circuits and Districts. See, *inter alia*, the following: *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. (2d) 523, 91 A. L. R. 781 (4th Circ., 1934); *Spain* v. *Powell*, 90 F. (2d) 580 (4th Cir., 1937); *Field* v. *Waterman S. S. Corp.*, 104 F. (2d) 849 (5th Cir., 1939); *Pittsburgh S. S. Co.* v. *Palo*, 64 F. (2d) 198 (6th Cir., 1933); *American Pacific Whaling Co.* v. *Kristensen*, 93 F. (2d) 17 (9th Cir., 1937); *The Birkenhead*, 51 F. (2d) 116 (D. C., E. D., Pa., 1930).

This Court's decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939), establishes nothing in conflict with our contentions. There negligence on defendant's part was shown, viz., a loose step in the engine room of petitioner's vessel; and it was held that the contributory negligence on plaintiff's part, which was also established, did not defeat recovery but that the comparative negligence rule was rightly applied by the Courts below.

In the case at bar, the plaintiff never got past the initial hurdle of showing negligence on defendant's part. The defendant was not an insurer. *The Cricket*, 71 F. (2d) 61, 63 (9th Circ., 1934); *The Tawmie*, 80 F. (2d) 144, 147 (5th Circ., 1936). We may confidently apply to the instant case the observations of this Court in *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343 (1932):

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before

evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120-121."

Conclusion.

We submit that what the plaintiff has obtained—the review of the Trial Judge's decision by a Bench of three Circuit Judges, their unanimous concurrence in what was done below, the award *sua sponte* of relief, representing lost wages, which his own counsel had haughtily rejected (R. 41)—is all that substantial justice requires; and as no public interest or importance attaches to the case, the plaintiff should not be allowed a further review.

The Petition for Certiorari should be denied.

September 11, 1941.

Respectfully submitted,

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